

## REMARKS

Claims 1-6, 8-28, 30-53, 55-56, and 58 are pending in the application. Claims 1-6, 8-14, 19-28, 30-36, 41-50, 53, 55, 56 and 58 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,128,097 to Hansen et al., and further in view of U.S. Patent No. 6,925,442 to Shapira et al. Claims 15-18, 37-40, 51 and 52 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,182,097 to Hansen et al. in view of U.S. Patent No. 6,925,442, to Shapira et al. and U.S. Patent No. 6,065,068 to Foote.

Reconsideration is requested. The rejections are traversed. No new matter is added. Claims 1-6, 8-28, 30-53, 55-56, and 58 remain in the case for consideration.

The Applicant first notes that Shapira was filed January 29, 1999, and issued August 2, 2005. Further, the Applicant notes that Shapira was not published prior to August 2, 2005. This patent application was filed November 8, 2001, and claimed priority from a provisional patent application filed November 21, 2000. Accordingly, Shapira is prior art to this patent application only under 35 U.S.C. § 102(e), and the changes made to 35 U.S.C. § 103(c) by the American Inventors Protection Act of 1999 apply to the Examination of this patent application.

The Applicant notes that all claims stand rejected under 35 U.S.C. § 103(a) in view of at least Shapira. The Applicant has attached a copy of the Patent Assignment Abstract of Title from the U.S. Patent & Trademark Office for Shapira showing its assignment history, labeled Exhibit A. As can be seen from Exhibit A, Shapira was assigned to WebTrends Corporation by an assignment executed April 6, 1999 and recorded April 22, 1999, and was later assigned to NetIQ Corporation as part of a merger document executed June 14, 2002 and recorded July 18, 2002.

The Applicant has attached a copy of an assignment from the inventor of this patent application to WebTrends Corporation, labeled Exhibit B. This assignment has been recorded in Reel/Frame 017984/0755 (2 pages) under date of July 24, 2006. Although executed recently, this assignment dates back to the filing date of the patent application. Therefore, "at the time this invention was made, [this patent application and Shapira were both] owned by the same person or subject to an obligation of assignment to the same person", as recited in 35 U.S.C. § 103(c)(1). Accordingly, as Shapira is prior art only under 35 U.S.C. § 102(e), Shapira is not available as prior art under 35 U.S.C. § 103(a).

The Applicant notes that at the time this utility patent application was filed, Shapira was assigned to WebTrends Corporation, whereas U.S. Provisional Patent Application Serial No. 60/252,522, from which this utility patent application claims priority, was assigned directly to NetIQ Corporation. Shapira was not assigned from WebTrends Corporation to NetIQ Corporation until 2002. The Examiner might have concluded from these facts that there was no common ownership between this patent application and Shapira. The Applicant submits a copy of a press release by NetIQ Corporation dated January 17, 2001,

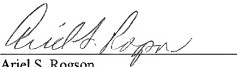
labeled Exhibit C, which dates from before the filing date of this patent application and discusses an agreement to merge with WebTrends Corporation. The Applicant also submits a copy of a press release by NetIQ Corporation dated March 30, 2001, labeled Exhibit D, which dates from before the filing date of this patent application and discusses the completion of the merger. At the time U.S. Provisional Patent Application Serial No. 60/252,522 was filed, the inventor was obliged to assign the invention to WebTrends Corporation. But by the time the assignment of U.S. Provisional Patent Application Serial No. 60/252,522 was executed, the merger was complete, and so the assignment was made directly to NetIQ Corporation. Based on these press releases and these facts, the Applicant believes it is clear that both patents were commonly owned or under an obligation of common ownership, whether the common owner was WebTrends Corporation (at the time U.S. Provisional Patent Application Serial No. 60/252,522 was filed) or NetIQ Corporation (at the time this utility patent application was filed). Accordingly, the amendments to 35 U.S.C. § 103(a) made by the American Inventors Protection Act apply regardless of the date being considered, and Shapira is not available as prior art under 35 U.S.C. § 103(a).

The Applicant apologizes to the Examiner for the delay in making this argument and for the confusion created by the assignment record. The Applicant neither realized the availability of this argument until recently, nor the confusion in the record relating to the ownership of this patent application and Shapira.

For the foregoing reasons, reconsideration and allowance of claims 1-6, 8-28, 30-53, 55-56, and 58 of the application as amended is requested. The Examiner is encouraged to telephone the undersigned at (503) 222-3613 if it appears that an interview would be helpful in advancing the case.

Respectfully submitted,

MARGER JOHNSON & McCOLLOM, P.C.



Ariel S. Rogson  
Reg. No. 43,054

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### Patent Assignment Abstract of Title

**Total Assignments: 4**

**Issue Dt:** 08/02/2005

**Application #:** 09240208

Filing Dt: 01/29/1999

**Inventors:** ELIJAHU SHAPIRA, DAVID S. MONTGOMERY, W. GLEN BOYD

**Title:** METHOD AND APPARATUS FOR EVALUATING VISITORS TO A WEB SERVER

## Assignment: 1

Reel/Frame: 009906/0540

Recorded: 04/22/1999

**Pages: 5**

**Conveyance:** ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS).

**Assianors: SHAPIRA, ELIJAHU**

MONTGOMERY, DAVID S.

BOYD, W. GLEN

**Assigntee:** WEBTRENDS CORPORATION

851 SW 6TH AVENUE, SUITE 1200

PORTLAND, OREGON 97204

**Correspondent:** (503) 222-3613

MARGER JOHNSON &amp; MCCOLLOM

ALAN T. MCCOLLUM

1030 S.W. MORRISON STREET

PORTLAND, OR 97205

## Assignment: 2

Reel/Frame: 012903/0384

Recorded: 07/18/2002

**Pages: 5**

**Conveyance:** MERGER (SEE DOCUMENT FOR DETAILS).

**Assignor: WEBTRENDS CORPORATION**

**Assianee:** NETIO CORPORATION

**Exec Dt:** 06/14/2002

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SAN JOSE, CALIFORNIA 95134  
**Correspondent:** MARGER JOHNSON & MCCOLLOM, P.C.  
ALAN T. MCCOLLOM  
1030 S.W. MORRISON STREET  
PORTLAND, OR 97205

**Assignment: 3****Reel/Frame:** 015972/0647**Conveyance:** SECURITY AGREEMENT**Assignor:** WEBTRENDS INC.**Assignee:** WELLS FARGO Foothill, INC.

2450 COLORADO AVENUE, SUITE 3000 WEST  
SANTA MONICA, CALIFORNIA 90404

**Correspondent:** PAUL HASTINGS JANOFKY & WALKER LLP  
515 SOUTH FLOWER STREET, 25TH FLOOR  
LOS ANGELES, CA 90071

**Assignment: 4****Reel/Frame:** 016522/0700**Conveyance:** ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS).**Assignor:** NETIQ CORPORATION**Assignee:** WEBTRENDS, INC.

2882 SAND HILL ROAD, SUITE 280  
MENLO PARK, CALIFORNIA 94025

**Correspondent:** BRIAN M. BERLINER  
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LOS ANGELES, CA 90071-2899

**Pages:** 8**Exec Dt:** 04/29/2005**Recorded:** 05/05/2005**Pages:** 4**Exec Dt:** 04/29/2005**Recorded:** 05/04/2005

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PATENT APPLICATION  
Docket No. 3561-084

## ASSIGNMENT

Assignor: WAUGH, Martin  
Address: 851 SW 6<sup>th</sup> Avenue, Suite 700  
Portland, Oregon 97204

Assignee: WEBTRENDS, INC.  
Address: 851 SW 6<sup>th</sup> Avenue, Suite 700  
Portland, Oregon 97204

Title of  
Invention: SYSTEM AND METHOD FOR ADDING NETWORK TRAFFIC DATA TO A  
DATABASE OF NETWORK TRAFFIC DATA

U.S. Patent Application:

Application Serial No.: 10/010,627  
Filing Date: November 8, 2001

For good and valuable consideration, the receipt of which is hereby acknowledged, the above-named Assignor sells, assigns and transfers to Assignee, effective November 8, 2001, the full and exclusive right, title and interest in and to the above-identified invention, patent application and patent rights throughout the world, including foreign patent priority rights; said invention, application and letters patent in this or any foreign country, and all divisions, continuations, reissues, non-provisionals and extensions thereof, to be held and enjoyed by Assignee, for its own use and benefit, and for its successors and assigns to the full end of the term for which letters patent may be granted in this or any foreign country, as fully and entirely as the same would have been held by Assignor had this assignment and sale not been made, and covenant that Assignor has full right so to do, and agree that Assignor will communicate to Assignee, or its successors and assigns, any facts known to Assignor respecting said invention, and testify in any legal proceeding, sign all lawful papers, execute all divisional, continuing, non-provisional and reissue applications, make all rightful oaths, and do everything possible to aid Assignee, its successors and assigns to obtain and enforce proper patent protection for said invention in this or any foreign country.

In the event that the patent application filing date or serial number is not known at the time this document is executed, Assignor hereby grants permission to the attorneys of record in the patent application to fill in the filing date and/or serial number above, and to record this assignment after such information is added.

Executed at Portland, Oregon, this 24th day of July, 2006

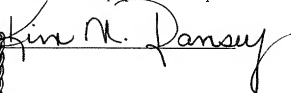
  
Martin Waugh  
Assignor

STATE OF OREGON )  
 ) ss.  
County of MULTNOMAH )

Before me this 24<sup>th</sup> day of July, 2006, personally appeared the above-named individual, to me known to be the person who is described in and who executed the foregoing assignment instrument and acknowledged to me that he executed the same of his own free will for the purpose therein expressed.

[SEAL]



  
Kim M. Ramsey

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## Press Releases

## NetIQ and WebTrends Agree to Merge

Strategic Combination Will Leverage Complementary Strengths to Create the Leading Provider of eBusiness Infrastructure Management and Intelligence Solutions

January 17, 2001

**SAN JOSE, CALIFORNIA, and PORTLAND, OREGON**—NetIQ® Corp. (NASDAQ: NTIQ), the market leader in Windows eBusiness infrastructure management, and WebTrends® Corp. (NASDAQ: WEBT), the market leader in web analytics and eBusiness intelligence, today announced a definitive merger agreement, creating the leading provider of eBusiness infrastructure management and intelligence solutions.

The combined company will be uniquely positioned to provide enterprise organizations, eBusinesses and service providers the most comprehensive infrastructure management and intelligence solutions for all the components of their eBusiness infrastructure—from back-end servers, networks and directories to front-end web servers and applications. The resulting product portfolio will include product lines for systems administration, network performance management, operations management, security management, web management, and eBusiness analytics and intelligence.

Under the terms of this transaction, which was approved by the boards of directors of both companies, WebTrends shareholders will receive 0.480 shares of NetIQ common stock for each WebTrends common share. Based on NetIQ's closing price of \$75.00 on Tuesday, January 16, 2001, the transaction is valued at \$36.00 per WebTrends share, or a total of approximately \$1 billion. On a fully diluted basis, NetIQ shareholders will own approximately 76% of the company and WebTrends shareholders will own approximately 24%. With the combination, NetIQ will have a market capitalization in excess of \$4 billion, pro forma calendar 2000 revenues of approximately \$160 million, more than 52,000 customers and about 1,000 employees. The combined company will operate under the name NetIQ Corporation.

"Building on the successful merger of NetIQ and Mission Critical and other recent strategic moves, this combination is the logical next step in our strategy to become the unparalleled leader in eBusiness infrastructure management and intelligence solutions," said Ching-Fa Hwang, chief executive officer of NetIQ. "By joining forces with WebTrends, we will significantly enhance our offering and deliver the most comprehensive solution for managing both Windows- and non-Windows-based platforms such as Linux and Sun Solaris, applications and devices, and Internet-based systems."

Eli Shapira, currently WebTrends chief executive officer, who will become chief strategy officer for NetIQ, stated, "This combination is a strategic fit that brings together two leaders focused on helping companies increase the return from their eBusiness initiatives, from NetIQ's comprehensive infrastructure management through WebTrends' Visitor Relationship Management solutions. Simply stated, this combination will result in greatly enhanced offerings for our more than 52,000 collective customers, increased business opportunities with partners, significant value creation for our shareholders and compelling opportunities for all our employees."

Shapira will join NetIQ's Board of Directors. Glen Boyd, currently president and chief technology officer of WebTrends, will become chief information officer of NetIQ, and Dan Meub, currently chief operating officer of WebTrends, will become senior vice president of WebTrends products at NetIQ.

The combined company will be headquartered in San Jose, California, with development and operational personnel located in Houston, Texas; Raleigh, North Carolina; and Bellevue, Washington. NetIQ will also maintain significant operations in Portland, Oregon, where WebTrends is headquartered.

The transaction, which will be accounted for as a purchase and is anticipated to be tax-free to the shareholders of both companies, is expected to close late in the first calendar quarter or early in the second quarter, subject to regulatory approvals, approval by the shareholders of both companies, and customary closing conditions. The holders of approximately 30% of WebTrends' outstanding shares have agreed to vote their shares in favor of the merger. The transaction is expected to be accretive to NetIQ's earnings per share beginning in the June quarter excluding non-cash acquisition related charges, if any, arising from the merger.

NetIQ and WebTrends will host an analyst/investor conference call today, Wednesday, January 17, 2001 at 8:30 a.m. (EST) to discuss the proposed merger between the two companies. Individuals calling from the United States can access the call by dialing 888-769-8925 at 8:20 a.m. (EST).

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International callers should dial 312-470-7391. The name of the call and pass code is NetIQ and WebTrends. Media are invited to join the call in a listen-only mode.

#### NetIQ/WebTrends Earnings Announcements

NetIQ will issue its second quarter of fiscal year 2001 earnings announcement on Thursday, January 18, 2001 following the stock market close. Ching-Fa Hwang, President and CEO, and Jim Barth, Senior Vice President and CFO will review second quarter earnings in a teleconference call at 4:30 PM EST. WebTrends will release its fourth quarter 2000 and year-end results on Tuesday, January 23, 2001 following the stock market close. Eli Shapira, Chairman and CEO and Jim Richardson, Senior Vice President and CFO will review the results with the investment community in a teleconference at 5:00 PM EST that afternoon. Both companies expect to report results exceeding consensus revenues and earnings estimates for the quarter.

#### About WebTrends

Founded in 1993, WebTrends Corporation (Nasdaq:WEBT) is the leading provider of Visitor Relationship Management and eBusiness Intelligence solutions for Internet and intranet servers and firewalls. WebTrends offers organizations a comprehensive set of solutions to improve the return on investment from eBusiness initiatives. The company is headquartered in Portland, Oregon. For more information, please visit WebTrends' Web site at [www.webtrends.com](http://www.webtrends.com) or call 503-294-7025.

#### About NetIQ

NetIQ (Nasdaq:NTIQ) is a leading provider of e-business infrastructure management software encompassing application, directory, server and network performance management. The company is headquartered in San Jose, California, with development and operational personnel in Houston, Texas; Raleigh, North Carolina; and Bellevue, Washington. For more information, please visit NetIQ's Web site at [www.netiq.com](http://www.netiq.com) or call 408-856-3000.

All referenced product names are trademarks of their respective companies.

NetIQ Corporation, its officers and directors may be deemed to be participants in the solicitation of proxies from NetIQ's shareholders with respect to the transactions contemplated by the merger agreement. Information regarding such officers and directors is included in NetIQ's proxy statement filed with the SEC on October 6, 2000. This document is available free of charge at the SEC website at [www.sec.gov](http://www.sec.gov) and from the NetIQ Corporation contact listed below.

SHAREHOLDERS OF WEBTRENDS AND NETIQ ARE URGED TO READ THE JOINT PROXY STATEMENT-PROSPECTUS TO BE INCLUDED IN THE REGISTRATION STATEMENT ON FORM S-4 TO BE FILED BY NETIQ WITH THE SECURITIES AND EXCHANGE COMMISSION BECAUSE IT WILL CONTAIN IMPORTANT INFORMATION. UPON FILING WITH THE SEC, THIS DOCUMENT WILL BE AVAILABLE FREE OF CHARGE ON THE SEC WEBSITE AT [WWW.SEC.GOV](http://WWW.SEC.GOV) AND FROM WEBTRENDS CORPORATION AND NETIQ CORPORATION THROUGH THE CONTACTS LISTED BELOW.

#### Safe Harbor Statement

Statements in this press release other than statements of historical fact are "forward-looking" statements within the meaning of the Private Securities Litigation Reform Act of 1995. The companies' actual future results could differ materially from the results discussed herein. Factors that could cause or contribute to such differences include the risks inherent in acquisitions of technology businesses including the successful consummation of the merger and integration of the companies, the timing and successful development of technology; the ability to retain key management and hire technical personnel and other employees; changing relationships with customers, suppliers and strategic partners; unanticipated costs associated with development and marketing activities; customer acceptance of new product offerings; pricing of new products; and competition in our various product lines. For a more complete discussion of risks and uncertainties for each company see the section entitled "Factors That May Affect Future Results" in the NetIQ annual report on Form 10-K, and "Risk Factors" in the WebTrends annual report on Form 10-K as filed with the Securities and Exchange Commission.

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## Press Releases

### NetIQ Corporation and WebTrends Corporation Complete Merger

March 30, 2001

**SAN JOSE, Calif.**—NetIQ Corporation (Nasdaq: NTIQ) and WebTrends Corporation (Nasdaq: WEBT), today announced that the merger of the two companies was completed following approval by both companies' stockholders. The common stock of NetIQ Corporation will continue to be traded on the Nasdaq National Market under trading symbol (NTIQ).

The merger creates a company that is uniquely positioned to provide enterprise organizations, e-businesses and service providers comprehensive infrastructure management and intelligence solutions for all the components of their e-business infrastructure—from back-end servers, networks and directories to front-end web servers and applications.

"The closing of this merger sets a new standard for managing distributed enterprises by offering best-of-breed infrastructure management solutions with comprehensive and robust e-business intelligence solutions," said Ching-Fa Hwang, chief executive officer of the combined company. "NetIQ is now the first vendor to link our customers' IT-related data with business metrics designed to enable them to increase the return from their e-business initiatives, and ease the management of their distributed enterprise."

Eli Shapira, chief strategy officer of the combined company and former chief executive officer at WebTrends, stated: "This combination will result in greatly enhanced offerings for our more than 52,000 collective customers, increased business opportunities with partners, and compelling opportunities for all our employees."

#### NetIQ Q3 Earnings Announcement

The Company's financial results for the quarter ended March 31, 2001 will be announced on April 26, 2001. NetIQ will conduct a conference call at 4:30 p.m. EDT that day to discuss results in more detail and to provide guidance.

#### About NetIQ

NetIQ Corp. (Nasdaq: NTIQ) is a leading provider of e-business infrastructure management and intelligence solutions for all the components of an organizations' e-business infrastructure—from back-end servers, networks and directories to front-end Web servers and applications. The company is headquartered in San Jose, Calif., with development and operational personnel in Houston; Raleigh, N.C.; Bellevue, Wash. and Portland, Ore. For more information, please visit NetIQ's Web site at [www.netiq.com](http://www.netiq.com) or call (408) 856-3000.

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